In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 31

W. WILLARD WIRTZ, SECRETARY OF LABOR, PETITIONER

v.

STEEPLETON GENERAL TIRE COMPANY, INC., AND A. E. STEEPLETON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE SECRETARY OF LABOR

This short reply is submitted in answer to respondent's heavy reliance on some 1957 unenacted legislative proposals (Resp. br. pp. 9–11), as bearing on the legislative intent of the 1949 amendment to the Act's "retail" exemption. Respondent's argument is that since the sponsors of the 1957 proposals were also members of Congress at the time of enactment of the 1949 amendment, the inference to be drawn is that the 1949 Congress did not intend to exclude from the "retail" classification any of the types of sales which the 1957 proposals would have expressly excluded, for if

795-053—65

the 1949 legislative intent had been otherwise, there would have been no need for Senators Kennedy and Morse to waste the Senate's time by introducing the 1957 proposals (Resp. br. p. 9).

The conclusive answer to respondent's argument is found in this Court's repeated rulings that subsequent unenacted legislative proposals afford no tenable basis for inferences of the legislative intent of existing legislation. *E.g.*, among the more recent cases, *United States* v. *Wise*, 370 U.S. 405, 411; *United States* v. *Price*, 361 U.S. 304, 310, 313; *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 348–349; *Waterman Steamship Corp.* v. *United States*, 381 U.S. 252, 269. As stated by the Court in dismissing the same kind of argument in the *Wise* case: "However, statutes are construed by the courts with reference to the circumstances existing at the time of the passage. The interpretation placed upon an existing statute by a subsequent group of Congressmen who are promoting legislation and who are unsuccessful has no persuasive significance here [citing numerous decisions]" 370 U.S. at 411.[1]

[1] Indeed, even where a subsequent Congress has passed a proposal clearly showing an intent different from that attributed to a current statute by its administrators and the courts (enactment having failed only because of presidential veto), this Court has held such legislative action without significance as a basis for inferring the intent of the earlier Congress, on the ground that "the abortive action of the subsequent Congress 'would not supplant the contemporaneous intent of the Congress which enacted the * * * Act.'" *Waterman Steamship Corp.*, *supra*, 381 U.S. at 269; *Fogarty* v. *United States*, 340 U.S. 8, 14.

The inference which respondent in the instant case seeks to draw from the 1957 legislative proposals rests on an even more tenuous basis than did the contentions advanced in the above cited cases. For the particular proposal on which respondent relies was only one clause of comprehensive bills which included numerous proposed amendments designed to expand the Act's coverage and limit its exemptions. Congress' "apparent disinterest" in the enactment of these entire bills (see Resp. br. p. 10)—which were not even reported out of committee, much less subjected to Congressional consideration or debate of specific features—"is no evidence that this single feature had special significance" and assuredly "cannot be taken to be a specific rejection of each and every feature" of the "entire bill." See *Gemsco, Inc.* v. *Walling*, 324 U.S. 244, 265.

Even had there been a specific rejection of the proposed amendment to the "retail" exemption, the terms of that proposal so differed in scope and effect from the government's interpretation of the 1949 amendment as to preclude any inference of Congressional disagreement with the government's view. The proposed redefinition in the 1957 bills would have eliminated the "industry recognition" clause and would have expressly excluded from the "retail" classification *all* sales to customers engaged in *any* "commercial" business, in addition to sales to customers engaged in a "mining, manufacturing, transportation, or communications business" (cf. Section 13(a)(3), quoted in Petitioner's main br. p. 36, fn. 17) whether

or not the goods and services were of a distinctively industrial or commercial type and regardless of the close similarity of the sales, in kind, price, quantity and other characteristics, to those normally made for personal use (cf. Pet. main br., Point III, pp. 29–39). In short, the effect of the proposed redefinition would have been to repeal the 1949 amendment and to enact expressly the most sweeping implications of the "business use" test, *i.e.*, the "artificial distinction[s]" at which the 1949 amendment was aimed (*id.* pp. 22–23). It is evident, we submit, that rejection of such a sweeping proposal, far from being indicative of a different view, would be entirely consistent with full endorsement of the government's interpretation of the present law.

Finally, the weakness of respondent's argument from subsequent legislative proposals—like its reliance simply on a few isolated loosely expressed comments made at the time of enactment of the 1949 amendment (see statements quoted in Resp. br. pp. 4–5)—is shown by the result of its reasoning: respondent is relegated to an interpretation of the exemption which is devoid of rational relationship or relevance to any statutory purpose and which would reduce the statute to such an absurdity as to raise serious doubts of its constitutionality (see Pet. main br., Point I, pp. 17–22).

Respondent rests its case on what it terms a "clear legislative mandate" to give effect to the particular industry's "recognition of the *term* 'retail' " by accepting "an industry's *definition* of 'retail' " (Resp.

br. p. 6, emphasis added)—*i.e.*, unmistakably equating "recognition" with "definition" or terminology.[2] Although respondent's brief, like the opinion of the court below, makes some references to "habits and practices" (br. pp. 4, 5), it is evident both from its brief and the testimony of its witnesses that the only "habit" or "practice" respondent and the courts below consider relevant is the "practice" of terminology or labelling (see Pet. main br. p. 11–12). Indeed, the very definition which respondent claims to be determinative of the exemption in the tire industry, by its terms, negates the relevance of any and all meaningful functional habits and practices. As respondent and its witnesses have persistently emphasized—and as the trial court found—under the industry's sweeping "not for resale" definition, "the sole distinction is whether or not it is a sale for resale" (R. 611a), "regardless of the character or identity of the purchaser, the use to which tires may be put, the quantities purchased or the price paid" (trial court's fdg. 9, R. 34a), "regardless of * * * any other factor" or "anything else" (*e.g.*, R. 235a, 303a, 467a–468a. 568a–569a).

It is significant, we submit, that respondent's brief makes no attempt to deny or dispute that the necessary implication and effect of its interpretation of the exemption is to permit industry members to decide

[2] Respondent's construction of "recognition" as synonymous with "definition" is also evident from their erroneous statement that "[t]here is no dispute * * * that the recognition of retail sales in the particular industry involved in this case includes all sales not for resale" (br. p. 3).

for themselves whether they shall be subject to the Act, thus depriving the statute of rational content. Nor does respondent make any pretense of reconciling its interpretation with this Court's *Kentucky Finance* decision or the 1949 legislative history which dictated that decision (see Pet. main br. pp. 26–28) or with the explicit and repeated legislative statements emphatically denying the very intent respondent and the courts below have attributed to the 1949 Congress (*id.* pp. 28–29).

Respectfully submitted.

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